(as he then was) in *Ilkiw* v. *Samuels* [6] clearly expressed the view that:

"..... it is plain law – so plain that there appears to be no direct authority, because everyone has accepted it as being the law over the last hundred years – that one can recover in an action only special damage which has been pleaded, and, of course, proved."

The question therefore is whether the learned Judge acted upon established principles when he fixed the loss of income at $1,000.00 per month. On the evidence before the learned Judge, it seemed clear that apart from the fact that the Statement of Claim, before the amendment, had alleged that there was a loss of income of $600.00, the respondent himself in no uncertain terms admitted under cross-examination that the profit was only $600.00 per month. The relevant part of his evidence reads:

"Before the accident, I was not paid salary. From the profit is about $600.00."

In our view this piece of evidence was highly relevant. It was a clear admission made by the respondent. Viewed in the light that the respondent was the only witness upon whose testimony the respondent sought to prove the loss, we were inclined to think that it was a clear misdirection on the part of the learned Judge when he omitted to consider it. A person judicially trained confronted with the evidence as was found in the circumstances of this case would not be unlikely to have come to a decision, on the balance of probabilities, that the loss suffered would only have been in the region of $600.00 per month. The omission to consider the relevant evidence was apparent from the grounds of judgment which clearly disclosed that the learned Judge only took into consideration the evidence given by the respondent under examination-in-chief as follows:

"The plaintiff carried out work as jeweller which is the main source of income. He also sells a few jewellery in the shop. He claims that his earning is $1,500.00 a month. After taking expenses for the family his income is $1,200.00 per month."

This was followed lower down in the Judgment in a concluding sentence which reads:

"As for loss of earnings I am of the view that the plaintiff was earning about $1,000/– per month at the time of the accident."

We reiterate that to arrive at such a finding in the light of the clear admission by the respondent constituted in our judgment a serious misdirection in law and in fact such that it justified interference by this court. It is primarily for this reason that we considered it fit to interfere.

Proceeding upon the basis that there was a profit of $600.00 per month, a deduction must be made for the share of the father who, according to the respondent, was old but still assisted him. A reduction of a sum of $100.00 should therefore be made. Thus for the 30 months during which period the respondent was not able to work he ought only to have been awarded a total sum of $15,000.00 ($5,000.00 x 3).

For the next 7 months when the respondent resumed work but was only getting a reduced income of $300.00 per month, he should have been awarded only a sum of $1,400.00 ($200.00 x 7).

And lastly, for loss of earning capacity we are of the view that a loss of income of $100.00 per month would have been a fair assessment. And granted that there was a loss in the earning capacity for a period of 25 years, the total amount, calculated on the accepted table, that should have been awarded would have come to $16,900.00.

For these reasons we allowed the appeal with costs. The order of the learned Judge was accordingly varied.

Appeal allowed.

Solicitors: *Gurdip & Co.; Sandu & Co.*

JAAFAR BIN IBRAHIM v. GAN KIM KIN

[S.C. (Seah, Mohamed Azmi & Syed Agil Barakbah S.C. JJ.) September 18, 1984 & February 23, 1985]
[Kuala Lumpur – Federal Court Civil Appeal No. 168 of 1984]

Contract – Contingent contract – Transfer of ½ share of land subject to approval of conversion and subdivision on or before specified date – Whether time essence of contract – Condition precedent – Specific performance – Contracts Act 1950, ss.36(1) & 56(1).

Practice and Procedure – Memorandum of Appeal should not contain argument or narrative – R.F.C. 1980, r. 62(1).

In this case the respondent, the registered owner of a piece of land, agreed to transfer a half-share in the land to the appellant, if he could obtain approval of the conversion

and subdivision of the land from the State Authority of Negri Sembilan by December 31, 1977. Such approval was not obtained before that date and the respondent relied on the provision in the Agreement that "thereupon the agreement shall became null and void and of no effect". The approval was only obtained on July 18, 1980. The appellant claimed specific performance of the agreement and other ancillary reliefs. The learned trial judge dismissed the appellants' claim as he held that the agreement was a conditional or contingent contract and as the deadline for performance of the contingent condition had lapsed, the agreement was null and void and the appellant had no claim against the respondent. The appellant appealed.

Held (1) this was a case where time was not merely of the essence of the contract but fulfilment of the promise by the appellant to obtain the approval on or before December 31, 1977, was a condition precedent of the whole contract;

(2) the respondent promised to transfer her half-share in the land to the appellant if the approval was obtained on or before December 31, 1977. The event had not happened by the deadline and therefore under section 36(1) of the Contracts Act 1950, the contract became void.

Cases referred to:

(1) *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng* [1960] M.L.J. 47.

(2) *Mrs. Chandnee Widya Vati Madden* v. *Dr. C.L. Katial* A.I.R. 1964 S.C. 978.

HIGH COURT.

N. Ramachandran (*Seeralan Ganeshmurugan* with him) for the plaintiff.

Khaw Chay Tee for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: On November 5, 1975 the parties here entered into a rather unusual agreement in writing. By the agreement (A 1 or page 1 of the agreed bundle of documents marked 'A'), the defendant, (the owner), the registered proprietor of the land in question, being desirous of subdividing the land, agreed to give 1/2 share of the said land to the plaintiff, (the agent), in consideration of the agent agreeing to pay "all requisite fees and expenses (including conversion and survey fees) to be incurred in connection with such subdivision". The application for such subdivision was to be made, and all such matters incidental to such application, were to be handled by the agent. This was a common ground at the trial and was readily assumed by both parties as an obligation on the agent, though the same was not very clearly set out in (A 1). Both parties agreed that, to quote, "as security for the fees and expenses to be expended by the agent in connection with the intended application for subdivision of the said land", the owner agreed to transfer, beforehand, and did transfer 1/2 undivided share of the said land, so that the application for the subdivision was to be in joint names of the owner and agent as registered co-proprietors. It became increasingly clear as the trial went on that the device of transferring 1/2 share beforehand was also to make the authorities to whom the application was to be made, aware of the presence of the name of the agent, so that, it was believed, the application would be processed sooner or more favourably. It became equally clear at the trial, that the agent had considerable experience in applications of this kind, so that other things being equal, the application would be for this reason also, processed with expedition. On transfer of 1/2 share of the land beforehand, and pending the approval of the application for subdivision, a re-transfer of 1/2 share was to be signed and held as "stake-holder" by Mr. Seah Choon Chye, a well-known Seremban solicitor, who prepared (A 1). This was duly carried out. Now comes the crucial part of (A 1) *i.e.* Clause 4 which I will set out below:—

"4. PROVIDED THAT:—

(1) In the event the said application for subdivision is not approved on or before December 31, 1977, or if the Agent shall pass away before the approval of the said application on or before the said date, the Landowner or her nominees may on the occurrence of either of the events aforesaid accept the transfer referred to in the preceding Clause and thereupon this Agreement shall become null and void and of no further force or effect and neither party shall have any claim against the other in connection with this Agreement.

(2) In the event the Agent shall pass away on or after the approval of the said application but prior to the issue of the qualified titles, the said transfer referred to in the preceding Clause may be accepted by the lawful widow of the Agent and the provisions of this Agreement shall remain valid and binding on the Landowner and the Agent's widow as if the said widow had been a party hereto."

Clause 4 set a deadline for the continuing validity or the termination of the agreement or (A 1), *i.e.* if the application for subdivision was not approved by December 31, 1977, the owner would ask for the retransfer to be implemented and therefore, to quote — "this agreement shall become null and void and of no further force ...". A race against time fixed was therefore set in motion on the signing of (A 1), and it was not disputed, that by December 31, 1977, the application for subdivision was not approved, and the retransfer in favour of 1/2 share was duly released by the stake-holder to the owner for registration. Subsequently this action was filed. The application for subdivision was later approved on or about July 18, 1980

though the application for conversion of the land, (into building land) was approved earlier *i.e.* on or about November 13, 1978, a date still subsequent to the date in clause 4 set out above.

The agent now seeks in this case:–

(a) damages, specific performance of (A 1) and the consequential retransfer of 1/2 share of the land *etc.* for breach of contract *i.e.* (A 1);

(b) breach of an oral agreement, or alternately an oral agreement to draw up a fresh contract, in both cases for retransferring the 1/2 share to the agent first before the agent paid the conversion fee to the authorities, and

(c) damages for fraudulently misrepresenting, or dishonestly or negligently allowing the period of paying for conversion fee to lapse and thereafter, paying such conversion fee herself without the knowledge of the agent who was presumably induced to wait for the retransfer first.

The amended statement of claim lacks clarity and what is stated above is what the Court gathers from it by putting it at the highest for the purpose of completely determining all the issues of the case. The owner denies the claim of the agent and counter-claims an order for removing the caveat lodged against the land by the agent in question, and damages for wrongful entry of such caveat *etc.*

On the agent's claim for damages or specific performance of (A 1), one must take a good and hard look at it. On a true construction, (A 1) would be annulled or become void on the happening of an event, *i.e.* if the application for subdivision of the land made to the relevant authorities, over which both parties had no control, (not involving, of course any omission or fault of the agent in submitting such an application), was not approved by December 31, 1977. The validity of (A 1) depended on this approval of his application by this date, and the existence of mutual obligations depended on this condition of approval by the relevant authorities by December 31, 1977. From the evidence of the parties, forming the background of (A 1), the essentiality of the speed of approval of the application for subdivision or to put it more succinctly its approval by December 31, 1977, was for both parties, as regards (A 1), everything or nothing. (A 1) should in my view be construed as a conditional contract or contract subject to a contingency, *i.e.* conditional on, or contingent on the approval of the application by that specified date. What then would be the position of such a contract in regard to the equitable rule that time shall not be the essence of a contract unless there is contrary intention by express words, or from the nature of the transaction or from surrounding circumstances? In this connection, one cannot ignore the Privy Council case of *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng*[1]. The *ratio decidendi* of that case is that a conditional contract or a contingent contract (*i.e.* the expression used in our Contracts Act, 1950), is wholly excluded from the operation of that equitable principle aforesaid. Lord Jenkins delivering the opinion of the Board, laid down the following special principles as applicable to a conditional contract:–

> "(i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date;
>
> (ii) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;
>
> (iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles."

Lord Jenkins' principle (iii), (although it refers to a conditional contract of sale), must apply, *mutatis mutandis,* to our instant case. In the *Aberfoyle case,* the sale of the rubber estate there was conditional upon the vendor there obtaining the approval of application for renewal of expired leases of part of the estate from the Ruler of Perak.

Should I be held wrong later that (A 1) was not a conditional contract or contingent contract, just because the words "conditional" or "contingent" did not appear therein or for some other reason, then I would hold that the nature of the contract, *i.e.* (A 1) herein was such *i.e.* for the same reasons that have led me into construing it in the first place as a conditional contract or contingent contract, that parties must have intended that time was to be of the essence. It would not be necessary to discuss the cases cited by learned counsel for the agent.

I hold that (A 1) was annulled or became void on December 31, 1977 when the application for subdivision of the land was not approved by the relevant authorities on that day and the subsequent registration of the retransfer of 1/2 share of the

land to the owner was completely proper and unquestionable.

I now deal with the question of the breach of a subsequent oral agreement set out above. In her evidence, the owner said to the effect that she did not negotiate with or talk to the agent and the discussion with him was conducted by her husband or her son. She denied having agreed to transfer once more the 1/2 share of the land to the agent after the earlier registration of the retransfer of the said 1/2 share from the agent to the owner. She denied having agreed to a fresh agreement with the agent or having told the agent not to pay the conversion fee to the Government until the said 1/2 share was transferred to the agent once more. She also denied having granted any extension of time to the agent after the deadline passed, and in this, curiously enough, the agent, in his evidence also said he was never informed, verbally or by notice of such extension. Thus, on these vital points of evidence, on which the agent sought to found an agreement subsequent to A 1, there was a sharp conflict between the agent's evidence and that of the owner.

I have seen the owner in the box; she behaved exactly like one of those uneducated, unsophisticated simple, but apparently dedicated housewives. Housewives like her, not infrequently, do depend on their husbands or children to negotiate with other men on their behalf about selling any land given by their husbands. In view of her having the bulk of the work of the application for subdivision done virtually *gratis* for her benefit, and having the land intact, if she succeeded in this action, I had to be really satisfied if she was staging an act of naivety in the witness box, bearing in mind also that she had signed her name in English in fairly good handwriting. I have found her to be the type of a housewife who is only too contented to leave matters, outside the domestic affairs, to the menfolk in her family. I therefore accept her evidence as against the evidence of the agent. It will be remembered that DW 1, the solicitor also said in evidence that it was the husband and one of the owner's sons who gave instructions to him. Her son and husband, of course gave evidence which corroborated hers.

Again, in connection with the evidence set out above, I found considerable force in learned counsel's submission that after the deadline passed, the land had been re-transferred to her sole name and the agreement had become null and void, the owner had nothing to gain by making the representations allegedly made by her.

In the result, though the Court's sympathy is unreservedly with the agent who had done so much for the benefit of the defendant, but would have to lose his bargain, I hold further that the owner did not falsely, fraudulently or negligently induce or misrepresent to the agent in a subsequent oral agreement to transfer once more the said 1/2 share to him *etc.*, and that there was no such subsequent oral agreement as alleged by the agent and set out above.

I now deal with the defendant's counterclaim for an order removing the caveat in question. Such an order will obviously follow the dismissal of the agent's claim.

I therefore dismiss the claim of the plaintiff with costs; allow the counterclaim of the defendant by making an order for the removal of the caveat in question as counterclaimed with costs with a further order for damages for wrongful entry of such caveat by the plaintiff to be assessed by the Senior Assistant Registrar of this Court, but the question of costs relating to such assessment of damages for such wrongful entry be reserved to the learned Senior Assistant Registrar.

[The plaintiff appealed to the Federal Court against the above decision].

SUPREME COURT.

N. Ramachandran (*S. Seeralan* with him) for the appellant.

B.G. Ee for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court): On June 5, 1984, Peh Swee Chin, J. dismissed the plaintiff's claim for specific performance of an agreement and for other ancillary reliefs. Following the dismissal he also allowed the defendant's counter-claim by ordering the removal of the caveat lodged by the plaintiff on the defendant's land – the subject matter of the agreement in dispute. We have dismissed the plaintiff's appeal and upheld the order of the learned Judge, and we now proceed to give our reasons.

The facts of this case had been covered in detail by the learned Judge in his written judgment, and there is no necessity for us to reproduce them. The learned Judge's findings of fact were also supported by the evidence and we found no reason

to disagree with any of them and this included the rejection of the subsequent oral agreement alleged by the plaintiff. The Memorandum of Appeal which ran to about 13 pages was more like a written submission and did not comply at all with the requirement of Rule 62(1) of the Rules of the Federal Court 1980 which provides:–

"The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."

Before us, the only material argument raised by Mr. Ramachandran for the appellant/agent was that the trial Judge was wrong in construing the 1975 agreement as a conditional or contingent contract. Counsel tried to persuade us to conclude that the learned Judge had failed to read clauses 4(1) and 4(2) of the agreement as a whole and if he had done so he would have held that the main object of these clauses was to provide for the re-transfer of the land to the respondent/landowner in the event the appellant should pass away before December 31, 1977. Secondly, it was argued that the learned Judge had failed to look at the substance of the contract and that in effect section 56 of the Contracts Act, 1950 should be applicable. Section 56(1) provides:–

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

It was also argued that in any event conversion and subdivision of the said land were in fact approved in principle by February 1976, *i.e.* before the deadline.

Having considered the written agreement as a whole, we were convinced that the parties had intended it to be a conditional or contingent contract in that the appellant would only be entitled to half share of the land if he, as the agent of the respondent, could obtain approval of the conversion and subdivision from the State authority of Negeri Sembilan by December 31, 1977 – a period of about two years and two months from the date of the agreement. The 1975 agreement consisted of four preambles and eight clauses (see pages 87 to 89 of Appeal Record). Preambles (2) to (4) and clauses (1) to (4) were as follows:–

Preamble (2) – The Landowner is desirous to subdivide the said land into housing lots.

Preamble (3) – The Landowner has agreed with the Agent that in consideration of the Agent agreeing to pay all the requisite fees and expenses (including conversion and survey fees) to be incurred in connection with the subdivision of the said land, the Agent shall be entitled to one-half (1/2) of the qualified titles issued pursuant to the approval of subdivision of the said land by the appropriate party.

Preamble (4) – As security for the fees and expenses to be expended by the Agent in connection with the intended application for subdivision of the said land, the Landowner shall transfer an undivided one-half (1/2) share in the said land to the Agent upon and subject to the terms and stipulations set forth.

Clause 1 – In consideration of the Agent agreeing to pay all the requisite fees and expenses to be incurred and chargeable in connection with the intended application for the subdivision of the said land and by way of security for same the Landowner shall on the date hereof at the expense of the Agent transfer an undivided one-half (1/2) share in the said land to the Agent subject always to the terms and conditions hereinafter appearing.

Clause 2 – Upon the registration of the said transfer, the parties hereto shall submit a joint application for the subdivision of the said land into housing lots to the appropriate authority and deposit the relevant document of title with same.

Clause 3 – Pending approval of the said application for subdivision on or before the date hereinafter stipulated the Agent shall deposit a memorandum of transfer in respect of his said undivided one-half (1/2) share in the said land with Mr. Seah Choon Chye, Advocate & Solicitor, Seremban as stakeholder.

Clause 4 – PROVIDED THAT:–
(1) In the event the said application for subdivision is not approved on or before December 31, 1977, or if the Agent shall pass away before the approval of the said application on or before the said date, the Landowner or her nominees may on the occurrence of either of the events aforesaid accept the transfer referred to in the preceding Clause and thereupon this Agreement shall become null and void and of no further force or effect and neither party shall have any claim against the other in connection with this Agreement.

(2) In the event the Agent shall pass away on or after the approval of the said application but prior to the issue of the qualified titles, the said transfer referred to in the preceding Clause may be accepted by the lawful widow of the Agent and the provisions of this Agreement shall remain valid and binding on the Landowner and the Agent's widow as if the said widow had been a party hereto.

In our view, clearly proviso (1) in clause 4 contained the most important and crucial term of the agreement to which all the other provisions including clauses 5 to 8 were subservient. In short, the respondent's obligation to transfer her half-share in the land to the appellant would only arise on con-

dition that not only must the appellant first obtain the necessary approval for subdivision of the land from the State authority of Negeri Sembilan but such approval must be obtained on or before December 31, 1977. Until that condition was satisfied the appellant's right to his share in the land would be kept in abeyance, and whatever services he had rendered and whatever expenses he had incurred towards the procurement of the said approval would be of no consequence unless the condition was satisfied and fulfilled. On the evidence, the learned Judge was clearly right in holding that the appellant did not in fact obtain the necessary approval by the specified date. It was only obtained on July 18, 1980 *i.e.* more than two years after the deadline. We must reject the argument that the approval in principle was obtained by February 1976 on the strength of the letter (Exhibit AB13) dated February 20, 1976. This letter was from the Collector of Land Revenue to the Area Director of Valuation, Negeri Sembilan and we failed to see how such a letter could be interpreted as a form of approval either in principle or otherwise by the State Government to the subdivision for the purpose of compliance with the requirement of clause 4(1). No evidence was produced at the trial from which it could reasonably be concluded that such approval had been obtained on or before December 31, 1977. Indeed the appellant in his evidence in-chief admitted that he could not get the approval for subdivision before the deadline (see page 34D of Appeal Record). We also found no merit in the argument that the main object of clauses 4(1) and 4(2) was to provide for the retransfer of the land to the respondent in the event of appellant's death before the crucial date. Giving the words used in these two clauses their plain meaning, clause 4(2) could not alter the condition created by clause 4(1). Further, clause 4(1) referred to two possible events – (1) if the application for subdivision was not approved on or before December 31, 1977; and (2) if the appellant should die before the approval of the application on or before the deadline. Whereas clause 4(2) governed the situation where before the deadline the appellant should die after approval had been obtained but prior to the issue of the Qualified Titles. The Indian case of *Mrs. Chandnee Widya Vati Madden* v. *Dr. C.L. Katial*[1] was referred to us for the proposition that the present case was not a contingent contract and that time was not of the essence of the contract. But the facts there were quite different. The contract of sale provided that the vendor should obtain permission of the Government for the sale within two months of the agreement, and if the permission was not forthcoming within the time, it was open to the purchaser to extend the date or to treat the agreement as cancelled. The vendor made the necessary application for permission but later withdrew it because he was unwilling to perform the contract. On the claim for specific performance by the purchaser it was held that the contract was not a contingent contract nor time was the essence of the contract; whereas the facts of the present appeal were entirely different. It is true that merely specifying the date of performance may not be enough to establish a clearly expressed intention to treat time as essential. Apart from an express term, the court may infer an intention of the parties to treat time as essential by reason of the nature of the contract (see *Halsbury's* Laws of England Vol. 36, 3rd Ed. page 323, para. 468). Further, a distinction should be made between "promissory" condition and "contingent" condition – the former being a promise or assurance for the non-performance of which a right of action accrues to the innocent party, and in the latter case the non-fulfilment of the condition gives no right of action for breach; it simply suspends the obligations of one or both parties (see *Chitty* on Contracts, 25th Edition, page 751, para. 752). In the present appeal, clause 4(1) was put in at the behest of the respondent as she and her husband (DW3) and son (DW4) wanted the approval for subdivision to be obtained by the appellant within two years in view of the appellant's previous experience in getting such approval and also his representation that the application would be processed faster if half share of the land was transferred to him and thereby turning the application into a Sino-Malay project. As found by the learned Judge in his judgment, "It became increasingly clear as the trial went on that the device of transferring half-share beforehand was also to make the authorities to whom the application was to be made, aware of the presence of the name of the agent, so that, it was believed, the application would be processed sooner or more favourably. It became equally clear at the trial, that the agent had considerable experience in applications of this kind, so that other things being equal, the application would be for this reason also, processed with expedition." Thus the whole basis for the agreement to transfer the half share in the land to the appellant was the time factor in getting approval. The stipulation in clause 4(1) was a "contingent" condition of the contract and unless the approval of the State Government was obtained before the deadline no obligation on the part of the respondent to transfer the half share of the land to the appellant would come into force. On the evidence the respondent wanted to dispose of the land for

the education of her children, and she and her husband knew that the land when subdivided as housing lots would fetch a higher value. The idea of the Sino-Malay approach to the whole project originated from the appellant to ensure speed and success of the application. The promised transfer of the half share to the appellant, though constituted the substance of the argeement, was contingent upon approval of the application before the deadline. The transfer was meant to be the reward for the appellant if the condition had been fulfilled. It was upon these circumstances that the parties entered into the 1975 agreement. In our judgment the express intention of the parties to make the deadline a "contingent" condition was made crystal clear in clause 4(1) which not only provided December 31, 1977 as the specified date within which the approval of the State Government was to be obtained but also provided that failure to fulfil the condition would render the whole agreement "null and void and of no further force or effect and neither party shall have any claim against the other in connection with this Agreement".

Though the word "condition" or "conditional" or "contingent" was not used in the agreement, on the true construction of the document we held that the learned Judge did not err in law or in fact in concluding the 1975 agreement to be a conditional contract or to be technically exact a contingent contract as defined in our Contracts Act, 1950. Since the deadline for performance of the contingent condition had been fixed then fulfilment of the obligation on or before December 31, 1977 must be strictly adhered to and the time should not be extended by reference to equitable principles (see *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng*).[2] In our judgment this was a case where time was not merely of the essence of the contract but fulfilment of the promise by the appellant to obtain the approval on or before December 31, 1977 was a condition precedent of the whole contract. As such section 56 of the Contracts Act did not apply and the proper provision should be section 36(1) which provides:–

"Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible."

In the present appeal the uncertain event was the approval for subdivision by the State authority. The respondent promised to transfer her half-share in the land to the appellant if the approval was obtained within two years of the agreement. The event had not happened by the deadline and therefore under section 36(1) the contract became void. The dismissal of the appellant's claim for specific performance was accordingly correct in law.

Order accordingly.

Solicitors: *Mahadevi Ganeshmurugan & Co.; Allen & Gledhill.*

PUBLIC PROSECUTOR v. SEERALAN

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C. JJ.) January 14, 29 & March 30, 1985] [Kuala Lumpur – Federal Court Criminal Application No. 21 of 1984]

Criminal Law and Procedure – Inquest – Counsel holding watching brief – Contempt of Court – Allegation that Magistrate was unfair and prejudiced – Refusal to leave court – Case dealt with by Magistrate – Criminal Procedure Code (F.M.S. Cap. 6), ss.128, 353 & 359 – Subordinate Courts Act, 1948. Third Schedule, para. 26.

Legal Profession – Counsel holding watching brief – Contempt of court.

In this case the Magistrate at Seremban was holding an inquest. The respondent Mr. Seeralan, a member of the Bar was in court holding a watching brief. In the course of the proceedings the respondent became emotional and made several allegations of bias against the Magistrate. The Magistrate ordered the respondent to leave the court but the respondent refused to comply. He continued to make allegations of bias against the Bench saying the Bench was unfair and prejudiced. The Magistrate eventually, after an adjournment, invoked paragraph 26 of the Third Schedule of the Subordinate Courts Act, 1948, took cognizance of the contempt committed by the respondent and required him to show cause why he should not be punished. The respondent denied the charge and claimed to be tried before another Magistrate. The Magistrate then fined him $150/– or in default one week's imprisonment. The next day the High Court exercising its powers of revision reversed and set aside the Magistrate's Order. The revisionary proceedings were held in the Chambers of the Judge in the presence of the Magistrate and counsel for the respondent. The Public Prosecutor subsequently referred three questions of law to the Supreme Court. These were –

(1) Whether or not in law criminal contempt has been committed in the face of the court by the respondent by accusing the presiding Magistrate in Port Dickson Magistrate's Court Inquest No. 47/1984 of being biased, unfair and prejudiced and by refusing to leave the court when ordered to do so by the learned Magistrate.

(2) If the answer to question (1) is in the affirmative, then whether it is right in law for the learned magistrate in the circumstances of this case to exercise his power of punishment for contempt of court summarily.